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## The Voice of Small Business

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### Testimony on MIOSHA Actions to Develop a Michigan Specific Ergonomics Standard

Testimony before the House Commerce Committee  
January 17, 2006

My name is Charles Owens and I am the State Director for the National Federation of Independent Business, an organization providing legislative advocacy for more than 20,000 Michigan small businesses.

**MIOSHA is Currently Promulgating the most far reaching and burdensome regulation on small business and all business in this state.**

I come before the committee today to discuss MIOSHA's (Michigan Occupational Health & Safety Administration) attempts to develop a Michigan specific ergonomics standard that would be imposed upon Michigan's job providers. While this may seem to be a mundane technical discussion, lawmakers should be aware that the adoption of a Michigan specific standard would undo much of the hard work done by the legislature and the governor to stem the exodus of jobs from our state. In particular, all of the discussions, summits, taskforces, and hearings about saving manufacturing jobs will be nothing more than posturing if MIOSHA is successful in promulgating an ergonomics standard.

Our approach this morning will be to give you a background on the development of this rule and why it is neither necessary nor beneficial to Michigan's workers and job providers. In doing so, we will also highlight what we believe to be a pattern of bureaucratic behavior that seeks to skirt legislative and administrative oversight and scrutiny in the development of this rule. This behavior began at the federal level and now persists at the state level in Michigan.

## **History & Background of Michigan's Ergonomic Rule Development**

### **Federal efforts:**

OSHA has spent more than ten years trying to promulgate a regulation to give ergonomics injuries a privileged status among workplace injuries. The ergonomics rule finalized by OSHA in 2000 was 10 pages, with approximately 1600 pages of appendices. This behemoth made ergonomics-related injuries specially privileged, with different workers' compensation benefits and sprawling new red tape requirements. At that time, OSHA's estimate of the cost to employers was an additional \$4.8 billion a year. Business associations and think tanks had issued estimates ranging from \$18 billion to \$125 billion a year. In any case, it would almost certainly have been the most expensive mandate ever imposed on business.

On November 14, 2000 the Occupational Safety and Health Administration ("OSHA") issued its Final Ergonomics Program Standard (the "Ergonomics Rule"). OSHA hastily promulgated the rule so that the statutory 60-day waiting period before the rule goes into effect would expire prior to the inauguration of a new president who might withdraw the standard.

In March of 2001, Congress passed, and President Bush signed, a Joint Resolution of Disapproval of the ergonomics regulations developed by the Occupational Safety and Health Administration (OSHA). This rendered the ergonomics regulation null and void, and prohibited OSHA from issuing any similar rule. In April of 2002, OSHA announced voluntary ergonomic guidelines in lieu of a rule.

### **Michigan efforts:**

Michigan is a "delegated" state. As such, Michigan administers the federal OSHA program. Under this arrangement, Michigan rules relating to OSHA jurisdiction cannot be less stringent than any federal standard, but they can be more stringent.

There are three standards commissions that oversee the adoption of federal OSHA rules / standards and promulgation of state rules and standards: Construction Industry Safety Standards Commission (CISSC), General Industry Safety Standards Commission (GISSC) and the Occupational Health Standards Commission (OHSC).

In March of 2001, after OSHA withdrew its rule, MIOSHA withdrew its standard that would have adopted the OSHA rule by reference. However, on June 26, 2002 the OHSC directed staff to create an advisory committee to draft a Michigan ergonomics standard. On August 15, 2002, GISSC also directed staff to create an advisory committee to draft a Michigan ergonomics standard. Both commissions created a joint steering committee that established guidelines for rule development and put together the Ergonomics Advisory Committee that was charged with developing a Michigan rule. On October 30,

2003 the Advisory Committee met and began discussions concerning development of a rule.

**MIOSHA's Standards Commissions Acted Without Proper Public Participation in Beginning the Process of Promulgating Such a Far Reaching and Burdensome Rule**

The two standards commissions that embarked on this process back in 2002 did so with almost no public process or notice to the business community. Although the commission meetings are open to the public, there was no indication that the commissions were about to promulgate a state specific ergonomic standard and most business representatives and public policy stakeholders were not made aware of the gravity of the commission's activities. The time for public and business input should have been before these decisions were made, and not after. Certainly the commissioners should have been aware of the controversy surrounding this issue after OSHA was forced to withdraw the federal rules and for the commissions to act as they did on this issue is poor stewardship of the public's trust. Defenders of the commission's actions may argue that this is just the beginning of a long process before any rule comes to fruition, but the fact of the matter is that the critical decision of whether a rule is necessary in the first place, has already been made without appropriate public input.

**What was the original charge to the Advisory Commission?** Although staff and Tycho Fredricks indicated at the 1-7-04 Advisory Committee meeting that the committee was charged to develop a standard and not determine if one was needed, the minutes of the June 26 meeting of the OHSC do not support that statement. The OHSC minutes of June 26, 2002 state: "A motion was made by Commissioner Lucas and was seconded by Commissioner Olson to begin forming an 'advisory committee' to determine if (*emphasis added*) Michigan needs a Ergonomics Standard. MOTION CARRIED UNANIMOUSLY." The August 15, 2002 GISSC meeting motion did appear to specifically charge the committee with promulgating a standard.

In light of the discrepancy, at the 2-11-04 meeting I requested that the two standards commissions be asked again what the specific charge of the committee was and that it be reflected accurately in the minutes. MIOSHA staff, Marsha Parrot Boyle, responded that they were aware of the discrepancy and that they (staff) had replayed the tape from the June 26 meeting and the wording of the minutes did not accurately reflect the motion that was made. To be certain of the committee's charge they also asked Commissioner Lucas to restate his motion and intent at the February 4<sup>th</sup>, 2004 OHSC meeting.

**Public Policy Implications of a Michigan Ergonomic Standard**

At a time when Michigan is shedding manufacturing jobs by the thousands, we find it incredible that we are about to become only the second state in the country, besides California, to have our own state specific ergonomics standard replete with fines, penalties and compliance enforcement. Many other states have wisely followed the federal OSHA lead and have taken a voluntary approach to ergonomics programs for

employers. Washington State repealed its state specific ergonomic standard by ballot initiative in November of 2003. For Michigan to move in the opposite direction by adopting a state standard certainly does not seem to indicate that we are serious about saving and creating jobs in Michigan. In addition to the negative message that such an action sends to job providers, it is also important to note that at a time of budget deficits the cost to state and local governments to administer a new ergonomics program for government employees has been estimated at somewhere between \$53.7 to 101.1 million.

### **Summary and Conclusion**

We believe that it is incumbent on the legislature and the governor to rein in MIOSHA and the standards commissions and halt the process of moving forward on a Michigan specific ergonomics standard. To do otherwise is to put yet another nail in the coffin of Michigan's manufacturers and job providers. I thank the committee for the opportunity to present our views on this important issue.

### **Attachments – exhibits**

- Timelines and Bullet Points on Various Issues
- 2-17-04 Resignation Letter to Ergonomics Advisory Committee
- 2-26-04 Letter to Governor Granholm on Ergonomics Issue
- Statement By Deputy Director Kalmin Smith on OSHA Ergonomic Standard
- MIOSHA Standards Commissions
- APA and Current Rules Process

Due to length, the following documents are available upon request as PDF files

- Total Cost of Compliance, by Provision of the Proposed Rule and 3-Digit SIC  
Source: Office of Regulatory Analysis, OSHA, U.S. DOL.

Table VIII-4 Estimated Economic Impact of the Proposed Ergonomics Standard on All Industries. Source: Office of Regulatory Analysis, OSHA, U.S. DOL.

## **Michigan MIOSHA Ergonomics Rule Development Timeline**

### **Federal Ergonomics Standard Timeline**

November 1999	OSHA announces plans to promulgate federal ergonomic standard
November 2000	OSHA Publishes final rule in the Federal Register – 29 CFR Part 1910
November 2000	Business groups, insurance companies, and some states sue OSHA over ergo regs because of WC conflicts in rule
March 2001	Congress passes, and the President signs, a resolution of disapproval repealing the rule. OSHA withdraws the rule
April 2002	OSHA announces voluntary ergonomic guidelines in lieu of a rule

### **Michigan Ergonomics Standard Timeline**

March 2001	After OSHA withdraws rule, MIOSHA withdraws its standard that would have adopted the OSHA rule by reference
June 26, 2002	OHSC directs staff to create advisory committee to draft MI ergonomics standard*
August 15, 2002	GISSC directs staff to create advisory committee to draft MI ergonomics standard
October 30, 2002	GISSC forms steering committee to work with OHSC in forming advisory committee
November 13, 2002	OHSC forms steering committee to work with GISSC in forming advisory committee
September 15, 2003	GISSC approves Advisory Committee members
October 1, 2003	OHSC approves Advisory Committee members

October 30, 2003	First Advisory Committee Meeting
January 7, 2004	Second Advisory Committee Meeting
February 11, 2004	Third Advisory Committee Meeting (Meetings have continued to present)
February 24, 2004	House Commerce Committee holds hearing on Ergonomics rule development
March 9, 2004	House Appropriations Subcommittee indicated effort to cut funding for rule development
August 19, 2004	Governor announces that funding cut for Ergonomics rule development is not "enforceable"
September 19, 2005	House Concurrent Resolution No. 19 introduced that urges agencies not to promulgate rules more stringent than Federal.
October 2005	Governor signs budget with funding cut for ergonomics rule development but directs agency to ignore the cut as not "enforceable"
October 27, 2005	Rep. Rick Jones announces introduction of legislation to prohibit MIOSHA from developing an Ergonomics rule.
January 17, 2006	House Commerce Committee holds hearing on HB5447 legislation to prohibit MIOSHA from developing an Ergonomics rule.

February 17, 2004

Mr. Douglas Kalinowski, Director  
Michigan Occupational Health & Safety Administration  
State Secondary Complex  
7150 Harris Drive  
PO Box 30643  
Lansing, MI 48909-8143

Dear Doug:

I want to thank you and the members of the Occupational Health Standards Commission and the General Industry Safety Standards Commission for the opportunity to serve on the MIOSHA Ergonomics Advisory Committee.

As you know, during my brief time on the committee I have sought to clarify the charge to the committee to determine if it was within the advisory committee's venue to examine if an enforceable rule-based ergonomic standard was necessary for Michigan instead of the voluntary approach taken by OSHA and many other states. At the February 11 meeting it became clear with the OHSC revision of the June 26, 2002 minutes at their February 4<sup>th</sup> meeting that the purpose of the advisory committee was to move forward and draft a rule based standard.

I am disappointed that the two standards commissions that embarked on this process back in 2002 did so with almost no public process or notice to the business community. I realize that the commission meetings are open to the public, but without any indication that the commissions were about to promulgate a specific ergonomic standard, most business representatives and public policy stakeholders would not have been aware of the gravity of the commissions activities. The time for public and business input should have been before these decisions were made, and not after. Certainly the commissioners should have been aware of the controversy surrounding this issue and for the commissions to act in this manner on this issue as they did, in my opinion, borders on malfeasance. Mr. Tycho Fredrick's suggestion at the January 7<sup>th</sup> advisory committee meeting that small business input was obtained from an "inpatient pharmacist at a major Grand Rapids hospital" is a reflection of just how out of touch the commissions are with reality. I have since discovered that the pharmacist in question is listed on the commission's roster as representing "labor".

At a time when Michigan is shedding manufacturing jobs by the thousands, I find it incredible that we are about to become only the second state in the country, besides California, to have our own state specific ergonomics standard replete with fines,

penalties and compliance enforcement. Certainly this does not seem to indicate that we are serious about saving and creating jobs in Michigan.

As the State Director for an organization representing more than 20,000 Michigan small businesses, I cannot participate in an exercise that will result in one of the most far reaching and burdensome regulations on small business and all business in this state and I therefore must resign from the advisory committee. I am hopeful that this process will be halted and Michigan will continue to encourage employers to adopt ergonomics best practices on a voluntary basis with MIOSHA serving as an advisor rather than an enforcer.

Again, I thank you for the opportunity to participate and I am sorry that my role on the committee was not what I had originally envisioned.

Charles S. Owens  
State Director



February 26, 2004

Honorable Jennifer Granholm  
Governor's Legislative Affairs Office  
Room E-120 Capitol Building  
Lansing MI 48933

Dear Governor Granholm:

As you are undoubtedly now aware, an issue of great importance to Michigan job providers has recently surfaced. MIOSHA's Occupational Health Standards Commission (OHSC) and General Industry Safety Standards Commission (GISSC) has appointed an Ergonomics Advisory Committee charged with promulgating a Michigan-specific ergonomics standard that would prove crippling to Michigan's manufacturers and other job providers.

Until last week, I served on the Ergonomics Advisory Committee. During my brief time on the committee I sought to clarify the charge to the committee to determine if it was within the advisory committee's venue to examine if an enforceable rule-based ergonomic standard was necessary for Michigan instead of the voluntary approach taken by Federal OSHA and many other states. At the February 11, 2004 meeting, it was made clear that the purpose of the advisory committee was to move forward in drafting a rule-based standard. As the State Director for an organization representing more than 20,000 Michigan small businesses, I could not, in good conscience, participate in an exercise that would result in one of the most far reaching and burdensome regulations on small business and all business in this state. I subsequently resigned from the advisory committee.

We appreciate your commitment to Michigan's job providers. Your calls for reducing regulatory burdens are welcome and we applaud your stated intentions to not balance the budget on the backs of small businesses. However, your good intentions could be easily undermined by a mandatory rule-based ergonomics standard. At a time when Michigan is shedding manufacturing jobs by the thousands, it is frightening that we could become only the second state in the country, besides California, to have our own state-specific ergonomics standard replete with fines, penalties and compliance enforcement. Certainly this would not seem to indicate that we are serious about saving and creating jobs in Michigan.

While some may argue that this process remains in the very beginning stages of a lengthy course of action, we would suggest that it is not a question of *if* a rule-based ergonomics standard is promulgated, but rather, *when*? Should the Office of Regulatory Reform grant a request for rulemaking, it would be very likely that thousands of Michigan

businesses would be faced with more regulation, additional paperwork and ultimately, fewer jobs to offer our residents.

We urge you to halt this process and allow employers to adopt ergonomics best practices on a voluntary basis with MIOSHA serving as an advisor rather than an enforcer. We look forward to your timely response regarding this important matter.

Sincerely,

Charles S. Owens  
State Director

Cc: Honorable Ken Sikkema, Senate Majority Leader  
Honorable Rick Johnson, Speaker of the House

**STATEMENT BY DEPUTY DIRECTOR KALMIN D. SMITH**  
**REGARDING FEDERAL OSHA'S PROMULGATION**  
**OF ERGONOMIC STANDARD**  
**November 15, 2000**

**New federal standards divisive and unnecessary.** Federal OSHA has taken a divisive step into uncertain territory in deciding to go forward with an occupational safety and health standard concerning ergonomics. While the standard is aimed at reducing the risk of ergonomically related injuries, there is no significant consensus in support of the standard. Federal OSHA, at a time when constructive cooperation between job providers and government is critical to reducing on-the-job injuries, has gone through the most contentious rulemaking process in its history.

**Voluntary state initiatives an effective alternative.** CIS supports quality ergonomic safety and health programs. However, the new OSHA standard is not necessary. Voluntary efforts by both government and the private sector have been achieving significant results and there is no reason for a mandatory one size fits all federal regulation.

**MIOSHA innovation and leadership.** The Michigan Occupational Safety and Health program administration has sought to reduce the incidence of ergonomically related injuries in a variety of innovative ways. Under the Michigan Occupational Safety and Health Act (MIOSHA) the state, not the federal government, administers the occupational safety and health program in Michigan pursuant to state standards. Because we are a state plan state, in order to continue federal approval and funding we must adopt as effective as safety and health standards within six months of the adoption of a standard by federal OSHA. We have not waited for Federal OSHA's sluggish and inflexible regulatory approach to ergonomic problems in the workplace. Over three decades ago MIOSHA education and training staff began providing workers and job providers with direct one-on-one worksite assistance in resolving repetitive motion injuries. We also began a number of seminars throughout the state aimed at providing employers and employees with information that would assist them in dealing with their ergonomic related programs.

**Ergonomic standing committee since 1980's.** In the late 1980's MIOSHA established a special in-house Ergonomic Standing Committee with representatives from throughout the MIOSHA program aimed at achieving an even greater impact on ergonomic injuries in Michigan. Among the projects the committee undertook was the establishment of recognition awards for employers that develop innovative ways to reduce ergonomic related injuries or have successfully reduced ergonomic injuries.

**Grants for economic education and training programs.** Some in private industry do not welcome government involvement in their operations, even when the assistance is voluntary and provided at no cost. For this reason, MIOSHA began a grant program in 1980 to encourage non-government solutions to ergonomic problems. Through that program, non-profit organizations are encouraged to compete for funding by submitting education and training programs aimed at significant occupational safety and health

issues. From the beginning of the SET grant program, MIOSHA has selected grantees who perform ergonomic related training and evaluation. There have been numerous SET grant programs throughout the years that have in whole or in part focused on ergonomic injuries. Currently, for the 2000-2001 grant year, three of our 17 grants are aimed at providing education and training to eliminate or reduce ergonomically related injuries. They are:

Michigan Health & Hospital Association - provides ergonomic training tailored to individual nursing and personal care facilities and includes the hospital setting.

U of M Center for Ergonomics - provides ergonomics training and on-site job analysis to small and medium sized employers.

United Auto Workers (UAW) - provides ergonomics training and job analysis for small manufacturing facilities.

**Private industry innovation and leadership.** Michigan's private sector job providers have also independently recognized the need to reduce ergonomic injuries and vigorously tackle the problem through retooling, job re-engineering, and safety training and education. Their enlightened voluntary efforts undoubtedly have had a far greater impact on worker safety than any government action or mandate.

**Ergonomic injuries down in Michigan.** These efforts by the State of Michigan and private industry, free of federal red tape and misguided nationalized standards have worked as demonstrated by the United States Department of Labor, Bureau of Labor Statistics (1992-1998).

From 1992 to 1998, private industry employment in Michigan increased by 15 percent. During those years, the actual number of ergonomic injuries has gone DOWN by 25 percent.

During that same period, the case rate (the number of injuries per 100,000 workers) has gone:

- 1) DOWN 23 percent for carpal tunnel syndrome injuries;
- 2) DOWN 31 percent for repetitive motion injuries;
- 3) DOWN 40 percent for injuries due to overexertion; and
- 4) DOWN 51 percent for tendonitis.

The raw numbers are as follows:

<u>Year</u>	<u>Annual Average Employment In the Private Sector</u>	<u>Total Private Sector Ergonomic Injuries</u>
1992	3,268,122	81,672
1993	3,342,638	80,939
1994	3,487,007	86,615
1995	3,609,786	83,905
1996	3,686,100	74,748
1997	3,762,852	68,868
1998	3,800,680	60,367

<u>Year</u>	<u>Carpal Tunnel Syndrome</u>	<u>Case Rate</u>	<u>Tendonitis</u>	<u>Case Rate</u>
1992	1,559	47.7	1,183	36.2
1993	2,270	67.9	1,171	35.0
1994	2,151	61.7	1,354	38.8
1995	1,934	53.6	1,069	29.6
1996	1,446	39.2	776	21.1
1997	1,495	39.7	1,157	30.7
1998	1,389	36.5	681	17.9

<u>Year</u>	<u>Overexertion</u>	<u>Case Rate</u>	<u>Repetitive Motion</u>	<u>Case Rate</u>
1992	23,889	731.0	4,989	152.7
1993	23,948	716.4	5,638	168.7
1994	24,215	694.4	6,506	186.6
1995	23,421	648.8	5,879	162.9
1996	20,912	567.3	5,037	136.6
1997	17,844	474.2	4,790	127.3
1998	16,673	438.7	4,007	105.4

Clearly, the intervention of nationalized heavy handed rules for an over bureaucratized federal OSHA is unnecessary and counter productive. Michigan government and Michigan employers have provided leadership in the successful effort to reduce ergonomic related injuries. MIOSHA representatives believe we can make significant progress toward continuing to reduce the incidence of these injuries through our efforts to facilitate the sharing of best practices and the continuation of our proven voluntary programs.

## **MIOSHA's Standards Commissions:**

### **A History of Regulatory Activism that has Crippled Michigan's National and Global Competitiveness.**

Michigan is a "delegated" state. As such, Michigan administers the federal OSHA program. Under this arrangement, Michigan rules relating to OSHA jurisdiction cannot be less stringent than any federal standard, but they can be more stringent.

There are three standards commissions that oversee the adoption of federal OSHA rules / standards and promulgation of state rules and standards: Construction Industry Safety Standards Commission (CISSC), General Industry Safety Standards Commission (GISSC) and the Occupational Health Standards Commission (OHSC).

Members of the commissions are appointed by the Governor with advice and consent of the Senate to 3-year terms. There are nine members: 4 from management, 4 from labor, and 1 from the general public. Of the labor representatives, one has to be a public employee. Of the management representatives, one has to be a public employer, and another has to be a small employer defined as less than 200 employees.

Although this arrangement would appear to engender public and business input into the rule-making process, practical experience would dictate otherwise. Of the four management representatives, three are typically not business owners, but managers from big corporations with expertise in the area of industrial hygiene or safety and risk management. As such, they have an inherent and conflicting interest in the development of rules. Their very existence and livelihood is the result of the companies they work for having to comply with rules. Typically these committee members are not representative of the employer community at large and tend to favor more stringent regulations in agreement with organized labor. The lone remaining committee member that is supposed to represent small business is typically also from an industrial hygiene background is rarely an owner. We would also contest that the range of "200 or less" would represent small business at the higher end of the scale.

Federal OSHA audits Michigan's program. Audits by OSHA often include "critiques" which identify deficiencies in the state program that must be corrected for program delegation to continue. In the late 1980's and early 90's a recurring OSHA critique of the Michigan program was the inability of the three standards commissions to adopt new or revised federal standards within the required timelines. Part of the reasons for the delay was that Michigan's three standards commissions were consistently holding up the adoption of federal rules and rule revisions in order to make them more stringent, which required public hearings and more commission meetings.

In 1991, after repeated complaints from business community representatives in trade and advocacy organizations and concerns that Michigan's competitiveness was suffering under the over-reaching of the MIOSHA Standards Commissions, Governor Engler threatened to return Michigan's program to the federal government and abolish the three standards commissions. A legislative solution prevailed that amended the MIOSHA Act so that all federal OSHA standards, rules and rule revisions were adopted by reference. In addition, the standards commissions could

not adopt or revise a rule that was more stringent than a federal rule or standard unless they could show a “clear and convincing” need. (408.1014 Act 154 of 1974 amended 10-3-91).

Subsequent court decisions have reduced the oversight authority of the legislature and, in particular, the Joint Committee on Administrative Rules (JCAR) to the point where most of the ability to halt rules development resides in the executive branch of government.



## **Joint Committee on Administrative Rules Background**

**Constitutional Issues.** In recent years, the role of the Joint Committee on Administrative Rules has been shrouded in uncertainty following a series of court rulings that held sections 45 and 46 of the Administrative Procedures Act to be unconstitutional. At issue in these cases were the prisoner visitation policies of the Department of Corrections. Initially, the department developed these policies outside of the rules process. However, after inmates challenged the policies - arguing that they should have been developed as administrative rules in accordance with the APA - the policies were formally promulgated as administrative rules. The inmates challenged the policy again, this time on the grounds that the rules were promulgated without subjecting them to review by JCAR or the legislature. In 1995, the Jackson County Circuit Court held that the rules were acceptable, and said that sections 45 and 46 of the APA were unconstitutional. The case was appealed to the Michigan Court of Appeals and the court consolidated the case with a similar case arising from Ingham County.

In 1997, the court of appeals ruled in *Blank v. Department of Corrections*, 222 Mich App 385, that section 45 of the APA violated the enactment and presentment clauses of Article 4 of the state constitution (thereby invalidating section 46), and that section 45 violated the doctrine of separation of powers. The court further held that sections 45 and 46 were severable from the remainder of the APA. Finally, the court upheld the rules despite the fact that typically the failure of an agency to follow the process of the APA would render the rule void.

The court of appeals struck down section 45 based on its reading of sections 1, 22, 26, and 33 of Article 4 of the state constitution. Section 1 vests the legislative power in the House and Senate. Section 22 provides that legislation shall be by bill and may originate in either house. Section 26 provides that no bill shall become a law without the concurrence of a majority of the members elected to and serving in each house. Finally, section 33 requires every bill passed by the legislature to be presented to the governor before it becomes law.

In invalidating the legislature's role in the rulemaking process, the court of appeals stated, "[b]ecause the procedures in section 45 do not mirror the requirements of article 4 of our constitution, the Legislature is interfering with the delegated authority by something short of a 'law'. By giving the JCAR the authority to veto administrative rules proposed by an executive agency, the Legislature has delegated legislative power to a smaller legislative body that can effectively negate a valid action of an agency without following the restrictions of article 4 of our constitution."

The court of appeals also said that in violating the enactment and presentment clauses of article 4, section 45 of the APA also violated the doctrine of separation of powers. The court stated, "[b]ecause there is no provision in section 45 of the APA for presentment to the executive for approval of the Legislature's veto of a rule, such legislative power in regard to rule-making goes essentially unchecked, and unchecked power is precisely what the separation of powers doctrine sought to avoid." Further, the court noted that there was already a process in the APA whereby the legislature could register its disapproval of a proposed rule. Under that provision (MCL 24.251), if JCAR, an appropriate standing committee, or a member of the legislature believes a promulgated rule is unauthorized, not within the legislative intent, or inexpedient, JCAR or a member may introduce a concurrent resolution that expresses the determination of the legislature that the rule should be amended or rescinded or may introduce a bill that amends or rescinds the rule. The court noted that if the legislature approves a concurrent resolution expressing its disapproval of a rule, "the legislature in essence is making a recommendation to the administrative agency to withdraw or amend the rule." However, that method has no legal effect on the rule. For JCAR or a member of the legislature to legally impact the rule, a bill must be introduced and go through the law-making process. In 2000, the Michigan Supreme Court upheld the court of appeals' decision to invalidate the legislative approval provisions on the APA (see *Blank v. Department of Corrections*, 462 Mich 103). In striking down the relevant portions of the APA, the court, relying on the U.S. Supreme Court's decision in *INS v. Chada* (1982), said the actions of JCAR or the legislature under sections 45 and 46 were inherently legislative and, therefore, in violation of the enactment and presentment clauses in Article 4 of the state constitution and the doctrine of separation of powers embedded in Article 3, Section 2 of the state constitution. However, the

supreme court differed with the court of appeals on the extent to which sections 45 and 46 were deemed unconstitutional. The court of appeals had struck down the two provisions in their entirety, meaning that portions of the authority granted to the Office of Regulatory Reform were also eliminated. However, the supreme court ruled that only subsections 8, 9, 10, and 12 of section 45, and the second sentence of subsection 1 of section 46 - which required an agency to file a rule with the Secretary of State until at least 10 days after approval of JCAR or the legislature - were involved.

Under the old rulemaking process, after the rules were drafted, submitted to review of the LSB, made subject to a public hearing, and reviewed by the attorney general, they were submitted to JCAR for review. The committee had two months to consider the proposed rule (though the time for review could be extended for one additional month). If JCAR approved of the rule within the time required, a certificate of the committee's approval would be attached to copies of the rule. If JCAR disapproved the proposed rule, the committee would report that fact to the legislature and return the rule to the agency. A rule could not be promulgated by the agency unless (1) the legislature adopted a concurrent resolution approving the rule within 60 days after the committee report was received by each house, or (2) JCAR subsequently approved the rule. If JCAR did not take any action within the time required, it would return the rule to the agency, and the chairperson or alternate would introduce a concurrent resolution in both houses approving the rule that would be placed directly on the calendar. The rule could not be promulgated unless the legislature adopted the concurrent resolution within 60 days or the rule was resubmitted to and approved by JCAR. Once the committee or the legislature approved the rule, the agency would formally adopt the rule